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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 354

BEN SUGARMAN,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF AND MOTION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD.

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The District Court of Appeal, Third Appellate District of the State of California, erred in holding, inherently and as construed and applied in this case, that Sections 954 and 1098 of the Penal Code of the State of California, permitting the trial en masse of defendants separately charged and separately accused as to different conspiracies and different alleged grand thefts allegedly committed against different persons, all consolidated in one indictment and tried before one jury, does not deny due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States 23

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In the Supreme Court
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OCTOBER TERM, 1949

No.

BEN SUGARMAN,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION OF BEN SUGARMAN FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Ben Sugarman and petitions this Honorable Court for a Writ of Certiorari directed to the District Court of Appeal of the State of California for the Third Appellate District, and for an Order to

the said District Court of Appeal, Third Appellate District, State of California, to certify the record to this Court and to reverse the decision of the Courts below for violation of rights asserted under the Fourteenth Amendment to the Constitution of the United States. The petitioner also asks leave to proceed upon the certified typewritten record. And in respect to these matters your petitioner, Ben Sugarman, respectfully shows as follows:

OPINION BELOW.

Entitled

People v. Burton, et al., 91 A.C.A. 817, 205 Pacific (2d) 1065.

JURISDICTION.

Jurisdiction is conferred by Section 2101 New Federal Judiciary Code, and by Rule 38½, Rules of the Supreme Court of the United States.

The decision of the District Court of Appeal, Third Appellate District, State of California, reviewing the trial proceedings in the Superior Court of San Joaquin County, was rendered May 6, 1949. Thereafter, and within the time allowed by law, a Petition for Rehearing was filed in said Court and denied, and within the time allowed by law, Petition was filed in the Supreme Court of California from the decision of the District Court of Appeal, said Supreme Court of California denied a hearing on said Petition on June 2, 1949. Thereafter, your petitioner telegraph-

ically requested an enlargement of time of this Honorable Court within which to file and docket the record and file the petition for certiorari and brief in support thereof, and said application was granted by Mr. Justice Black, who enlarged the time within which to file the said petition to September 29, 1949.

The judgment of the District Court of Appeal was also attacked by a petition for a Writ of Habeas Corpus, filed in the Supreme Court of the State of California, making as a part of said attack, the entire record in this case as an Exhibit therein, and said Writ of Habeas Corpus was denied by the Supreme Court of the State of California, Justices Jesse Carter and B. Rey Schauer voting for the hearing therein. Said denial was on July 14, 1949. It was stipulated by the Attorney General of California on said habeas corpus proceedings that the questions involved are fundamental and important.

A second fundamental question raised in this case is whether the petitioner, Ben Sugarman, was singled out for invidious treatment by the State of California in a small county, to-wit, San Joaquin, being compelled to stand trial before one jury on separate offenses separately stated, while seventy-five percent or more of the evidence going before this jury related to other defendants there and then being tried on other charges. Admittedly, these procedures have not generally been followed in California heretofore.

People v. Davis, 42 Cal. App. (2d) 70, 108 P. (2d) 85.

The question is raised for the first time in this case.

Public defenders in Los Angeles and San Francisco urged the California Supreme Court to consider these issues. Under the circumstances, the petitioner was singled out for treatment unlike that given to other persons charged with crimes in California. This constitutes a denial of the equal protection of the law.

Louisiana v. Resweber, 329 U.S. 459;
Hysler v. Florida, 315 U.S. 411, 423;
Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220;
American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92, 45 L.Ed. 102;
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Burke v. New York, 156 Fed. (2d) 791;
60 Harvard Law Review, 271.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The essential portions of the Fourteenth Amendment to the Constitution of the United States, Section 1, provide as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 954 of the Penal Code of California provides as follows:

"An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count."

Section 1098 of the Penal Code of California provides as follows:

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial,

and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants."

Article I, Section 7 of the Constitution of the State of California provides as follows:

"the right of trial by jury shall be secured to all, and remain inviolate;"

SHORT STATEMENT OF THE FACTS.

This case involves the constitutionality of Sections 954 and 1098 of the Penal Code of the State of California, as construed and applied in this case, and the denial of fair trial to the petitioner.

Particularly it involves the right of a State under the due process clause of the Fourteenth Amendment to the Constitution of the United States to try citizens en masse, where the indictment charges separate and distinct crimes not all provable against the same defendant, *before one and the same jury.* It involves the question of whether such procedure and proceedings provides an accused citizen with procedural due

process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It involves the important question of whether an individual may receive fair trial under such procedure and proceedings as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It also involves the issue of whether the appellant was singled out for invidious treatment by the State in this case.

In the habeas corpus attack before the Supreme Court, being forwarded separately to this Court, the Attorney General of the State of California, the highest non-judicial officer of the State, stipulated that the questions were of fundamental importance and ought to be decided on Federal grounds.

The petitioner, Ben Sugarman, was charged in Count I of an indictment returned in San Joaquin County, California, with *conspiracy* to commit grand theft of $15,550.59 from the Phoenix Insurance Co., on or about March 1, 1946. In Count II he was charged with grand theft of the same amount on the same date, and in Count IX he was charged with violation of section 556 of the Insurance Code on or about February 28, 1946.

In the same indictment two other defendants, Burton and Martin, were charged in Count III with conspiracy to commit another and different and separate grand theft of $12,827.06, on or about October 25, 1946. In Count IV Burton and Martin were charged with grand theft of this same amount from the same

company on the same date. In Count V Burton and Martin were charged with conspiracy to commit still another Grand Theft of $6,716.57 from the St. Paul Fire & Marine Insurance Co. In Count VI Burton and Martin were charged with Grand Theft of this amount. In Count VII Burton and Martin were charged with a conspiracy to commit Grand Theft of $2,029.61, from the Connecticut Insurance Co., on or about February 19, 1947. In Count VIII Burton and Martin were charged with Grand Theft of that amount from that company. The last two counts were alleged to have occurred more than one year after the counts in which petitioner was involved.

Thus it will be seen that while the petitioner Sugarman was charged with one conspiracy and an alleged theft growing out of the one item, the other two defendants were charged with separate crimes and separate thefts and separate conspiracies on different dates and against different persons, and these were all joined in one indictment.

Motions for severance on behalf of defendant Sugarman were denied as were motions for a separate trial and his demurrer to the indictment. After a long trial in which more than 75% of the evidence in the record pertained to the defendants Burton and Martin alone and not to the defendant Sugarman, Burton and Martin were also convicted on the separate charges separately stated before the same jury. The defendant Sugarman was also convicted by the same jury and all were sentenced to the penitentiary.

The evidence applicable to Burton and Martin was in many respects highly prejudicial. Motions for a new trial were made and denied, and an appeal followed. In the District Court of Appeal the appellant Sugarman contended that the effect of the action of the trial Courts denying his motion for a separate trial whereby he was forced to submit to a joint trial constituted a violation of due process of law in violation of Article I, Section 14, of the Constitution of the United States. The District Court of Appeal ruled upon the challenge of unconstitutionality of the proceedings, and held that due process under the United States Constitution had not been violated. On petition for hearing in the Supreme Court of California the issue was again raised as to the denial of due process and that Court denied a hearing, two Justices voting for the hearing, to-wit Justices Carter and Schauer.

In the meantime, a Writ of Habeas Corpus was filed in the Superior Court of the State of California attacking the constitutionality of Sections 954 and 1098 of the Penal Code of California as construed and applied in this case, submitting as the evidence on the writ a record in the trial of this case.

Challenge was also made upon the ground of denial of the equal protection of the laws which States are bound to apply and whether petitioner Sugarman was not singled out for invidious treatment in this case.

The Superior Court denied the writ on June 9, 1949. A new writ was filed in the District Court of Appeal, Third Appellate District, State of California,

on June 10, 1949, challenging the constitutionality of the statutes and proceedings, and said writ was denied by the District Court of Appeal on June 14, 1949.

Thereafter, a writ was filed in the Supreme Court of California, on July 1, 1949, and denied by that Court on July 14, 1949, Justices Carter and Schauer voting for the writ.

Thus, every remedy in the State of California has been exhausted, both directly from the judgment and by habeas corpus attack. As the habeas corpus attacks will also be brought up here to this Court, we are mentioning them herein.

In both the direct and the habeas corpus attacks a challenge was made to the procedure had herein as violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Also the constitutionality of Sections 954 and 1098 of the Penal Code of California as construed and applied was raised in the State Courts and the challenge there denied.

STAGES AT WHICH THE DUE PROCESS QUESTION WAS RAISED.

On appeal from the judgment, the due process question was first raised in the District Court of Appeal, Third Appellate District, which denied the challenge. It was renewed on Rehearing in the said District Court of Appeal and therein denied. It was again renewed in the Supreme Court of California.

On habeas corpus it was first raised in the Superior Court, on June 9, 1949, and the challenges to the constitutionality of Sections 954 and 1098, as construed and applied, was denied under the Fourteenth Amendment to the Constitution of the United States. It was again raised in the District Court of Appeal, Third Appellate District, on habeas corpus on June 10, and denied on June 15, 1949. It was again raised in the Supreme Court of the State of California and on July 28, 1949 it was denied by that Court, Justices Jesse Carter and B. Rey Schauer voting for the issuance of the writ (34 A.C. 189).

QUESTIONS PRESENTED BY THIS WRIT.

I.

WHETHER A STATE STATUTE AS CONSTRUED AND APPLIED, PERMITTING MASS TRIALS—THAT IS, ONE TRIAL OF DIFFERENT DEFENDANTS CHARGED WITH SEPARATE CONSPIRACIES AND SEPARATE SUBSTANTIVE OFFENSES ON DIFFERENT DATES AGAINST DIFFERENT PERSONS—TO BE TRIED ON ONE INDICTMENT BEFORE ONE JURY, DOES NOT OFFEND DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

WHETHER THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING THAT SECTIONS 954 AND 1098 OF THE PENAL

CODE OF THE STATE OF CALIFORNIA, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, ARE NOT UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN PERMITTING THE TRIAL EN MASSE OF DEFENDANTS ACCUSED OF DIFFERENT CONSPIRACIES AND DIFFERENT ALLEGED GRAND THEFTS AGAINST DIFFERENT PERSONS TO BE CONSOLIDATED IN ONE INDICTMENT AND TRIED BEFORE ONE JURY.

AND WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT SUCH A TRIAL AFFORDS PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

WHETHER THE DUE PROCESS OF LAW NORMALLY AFFORDED BY THE STATE STATUTES AND CONSTITUTIONAL PROVISIONS IN THE STATE OF CALIFORNIA HAVE BEEN SO CONSTRUED AND APPLIED IN THIS CASE AS TO DENY FAIR TRIAL AND THUS TO VIOLATE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

IV.

WHETHER PETITIONER SUGARMAN, IN BEING SINGLED OUT IN THIS CASE FOR INVIDIOUS TREATMENT BY THE STATE OF CALIFORNIA, WAS DENIED THE EQUAL PROTECTION OF THE LAW.

The constitutionality of the challenged sections of the State of California, as construed and applied in this case, are Sections 954 and 1098 of the Penal Code

of the State of California. They are challenged both under the due process and equal protection clauses of the Fourteenth Amendment.

We have treated them jointly and assigned their application jointly, as well as separately, as their construction necessarily requires joint consideration.

REASONS FOR ALLOWING WRIT.

This case involves fundamental questions of criminal law and procedure affecting all of the States of the United States.

The fundamental question in this case is: Whether, in the United States of America, there can constitutionally be a mass trial before the same jury of separate conspiracies, separately stated, and separate offenses against separate individuals, separately stated, all combined in one trial before the same jury; and, whether such procedure is so offensive to due process of law as to require reversal of the judgments below.

This Court has recently condemned the misuse of conspiracy charges.

Krulewitch v. United States, 93 L. Ed. 623.

It has also held that the trial of multiple conspiracies before the same jury is so prejudicial as to result in unfair trial and to require reversal.

Kotteakos v. United States, 328 U. S. 750, 90 L. Ed. 1557.

Such a procedure denies fair trial to an accused, guaranteed by the Fourteenth Amendment to the Constitution of the United States wherever it occurs.

Re Oliver, 333 U. S. 257.

The question is one of great importance in the administration of justice. It was recognized as such by various public defenders of the State of California, both of Los Angeles and of San Francisco, who urged a determination of these issues which may largely affect a great number of poor persons who could all be herded together and consolidated into one trial. It was also recognized by the Attorney General of California as of fundamental importance.

CASES BELIEVED TO SUSTAIN JURISDICTION.

Pointer v. United States, 151 U. S. 396, 399, 404;

Optner v. United States, 13 Fed. (2d) 11, 12;

Ashe v. United States, 2 Fed. (2d) 735;

Krulewitch v. United States, 93 L. Ed. 623;

Re Oliver, 333 U. S. 257;

Kotteakos v. United States, 328 U. S. 750, 90 L. Ed. 1557;

McElroy v. United States, 164 U. S. 76, 41 L. Ed. 355;

Carter v. Illinois, 329 U. S. 173, 91 L. Ed. 172;

Buchalter v. New York, 319 U. S. 427, 87 L. Ed. 1492;

Resweber v. Louisiana, 329 U. S. 459;

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166;

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;

De Jonge v. Oregon, 299 U. S. 353;

Hebert v. Louisiana, 272 U. S. 312.

Wherefore, for the violation of fundamental and fair procedure guaranteed by the Fourteenth Amendment to the Constitution of the United States, your petitioner respectfully prays that this Court issue its writ of certiorari to the Court below and that the judgments below be reversed.

Dated, Los Angeles, California,
September 21, 1949.

Respectfully submitted,
MORRIS LAVINE,
Attorney for Petitioner.

MAX WILLENS,
OF WILLENS AND BOSCOE,
Of Counsel.

In the Supreme Court
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United States

OCTOBER TERM, 1949

No.

BEN SUGARMAN,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion below is found in the case of *People of the State of California v. Don Burton, et al.*, 91 A.C.A. 817, 205 P. (2d) 1065.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by Section 2101 New Federal Judiciary Code, and by Rule 38½, Rules of the Supreme Court of the United States.

The decision of the District Court of Appeal, Third Appellate District, State of California, was rendered May 6, 1949. Thereafter, and within the time allowed by law, a petition for rehearing was filed in said Court and denied, and within the time allowed by law, petition was filed in the Supreme Court from the decision of the District Court of Appeal, said Supreme Court of California denied a hearing on said petition on June 2, 1949. Thereafter your petitioner telegraphically requested an enlargement of time of this Honorable Court within which to file and docket the record and file the petition for certiorari and brief in support thereof, and said application was granted by Mr. Justice Black, who enlarged the time within which to file the said petition to September 29, 1949.

The judgment of the District Court of Appeal was also attacked by a petition for a writ of habeas corpus filed in the Supreme Court of the State of California, making as a part of said attack, the entire record in this case as an exhibit therein, and said writ of habeas corpus was denied by the Supreme Court of the State of California, Justices Jesse Carter and B. Rey Schauer voting for the hearing therein. Said denial was on July 14, 1949.

STATUTES.

The statutes are set out in the petition ante.

SUMMARY STATEMENT OF THE FACTS AND THE ISSUES INVOLVED.

On February 2, 1946, at approximately 3:30 o'clock in the afternoon a fire broke out at Burton's Shoe Salon, in Stockton, California, in the basement of the Burton Building in Stockton.

George Watrous, agent in Sacramento for the Phoenix Assurance Company, referred the adjustment of the loss to the defendant Frank Martin, not a petitioner here.

On February 4, 1946, Martin called upon Munro English, assistant manager of the Phoenix Assurance Company in San Francisco and received confirmation of his employment, and also authorization to employ the firm of Sugarman Brothers, a copartnership, of which Harry Sugarman and the appellant, Ben Sugarman, are partners, to advise with respect to taking over the stock of merchandise for salvage purposes.

Burton carried his fire and other insurance with George Watrous, whose offices were located in Sacramento. On February 3, 1946, Watrous, upon learning of the fire, requested Frank Martin, an insurance adjuster with offices in the City of Sacramento, to investigate the fire and the possible loss.

Mr. Burton, the insured, carried insurance on the stock of merchandise at the store in Stockton, California with the Phoenix Assurance Company; on the furniture, furnishings and fixtures, he carried it with the St. Paul Fire and Marine Insurance Company and on the building, with the Phoenix Assurance Com-

pany, and use and occupancy insurance with the Connecticut Fire Insurance Company. The following day the appellant was employed for the single purpose of advising whether the stock of merchandise should be taken over by the insurance company for salvage purposes.

At that time, and for many years prior thereto, appellant had been engaged in the salvage business in the City of San Francisco, and was an experienced and recognized expert on the matters relating to salvage. The record shows that all three of the defendants were men of previous good character and impeccable reputations. Each of the witnesses testified during the trial and no evidence attacking the previous reputations of good character of any of the defendants was offered by the State.

After the appellant made three trips to Stockton for the purpose of inspecting the stock of merchandise, he reported to Martin against taking the stock of merchandise over by the insurance company for salvage purposes. He estimated the amount which could be received for the merchandise as salvage. He then, at the request of Martin, estimated the amount of loss which would be thereby occasioned. This he did by subtracting the estimated salvage value from the inventory cost of the stock. Appellant had no further connections with the matter thereafter.

Martin adopted the figures of loss which appellant had utilized for the purposes of determining the salvage value of the merchandise and securing the execu-

tion of proofs of loss by Burton and reported the loss accordingly. The Phoenix Assurance Company immediately paid to Burton the loss so reported amounting to $15,550.59.

As a result of this single and lone transaction, the appellant was charged in the first two counts of the indictment jointly with Burton and Martin of the crime of conspiracy to commit grand theft and with grand theft of the same amount and in the ninth count with violation of the insurance code.

In the same indictment defendants Burton and Martin were charged with different conspiracies, with different allegations of grand theft against different alleged victims. Each of these others were alleged to have occurred on different dates long after the counts involving petitioner. The only common element, or a single spoke in the wheel, that connected them at all if it can be regarded as such was that in each case it was charged that the results of the same fire had been misrepresented. However, there were different losses against different alleged victims, and under different circumstances and the alleged misrepresentations were not in fact the same.

Motions were timely made in advance of trial to sever the trials. These motions were denied. The appellant Sugarman was forced to stand trial with the other two defendants. Seventy-five per cent of the evidence, some of a very prejudicial nature, related solely to the other two defendants and the other charges alleged in the indictment and was in no way connected with this appellant.

On appeal, in the District Court of Appeal, appellant contended that such procedure was violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and denied him fair trial as guaranteed by that amendment. A petition for hearing in the Supreme Court was denied June 2, 1949 (33 Adv. Cal. 889), two justices of that Court, Justices Carter and Schauer, voting for a hearing.

THE QUESTIONS PRESENTED BY THIS WRIT AND SPECIFICATIONS OF ASSIGNED ERROR.

I.

THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, THAT SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA PERMIT THE TRIAL EN MASSE OF DEFENDANTS ACCUSED OF DIFFERENT CONSPIRACIES AND DIFFERENT ALLEGED GRAND THEFTS COMMITTED AGAINST DIFFERENT PERSONS, IN ONE INDICTMENT AND TRIED BEFORE ONE JURY.

II.

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THIS CONSTITUTES A FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION.

III.

THE QUESTIONS INVOLVED IN THIS CASE ARE FUNDAMENTAL ON THE ISSUE OF FAIR TRIAL PROCEDURE GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

I.

THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT OF THE STATE OF CALIFORNIA, ERRED IN HOLDING, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, THAT SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA, PERMITTING THE TRIAL EN MASSE OF DEFENDANTS SEPARATELY CHARGED AND SEPARATELY ACCUSED AS TO DIFFERENT CONSPIRACIES AND DIFFERENT ALLEGED GRAND THEFTS ALLEGEDLY COMMITTED AGAINST DIFFERENT PERSONS, ALL CONSOLIDATED IN ONE INDICTMENT AND TRIED BEFORE ONE JURY, DOES NOT DENY DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is highly important that this Court grant a hearing to determine fundamental issues of criminal law involving due process within the United States for the guidance and government of the various States of the United States. The Attorney General of California, being the highest non-judicial officer of the State, recognized the importance of this issue, as have the various public defenders in the State of California.

The fundamental question in this case is whether a State may under the due process clause of the Fourteenth Amendment adopt such unfair procedure as to result in unfair trial.

As Mr. Justice Roberts says in *Snyder v. Massachusetts*, 291 U.S. 97 at 137, the Court said:

> "A distinction has always been observed in the meaning of due process as affecting property

> rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. **Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just.**"

And, in that case, the Court further stated:

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept * * * What is fair in one set of circumstances may be an act of tyranny in others."

How, then, can any defendant accused of one conspiracy receive a fair trial, if in the same trial two other defendants are separately charged with separate and distinct crimes, on separate and distinct dates, and all brought before one and the same jury? This is mass trial, before a jury of laymen. It may go in Europe but not in the United States under an ordered concept of justice. And, while this case only involves but three defendants if the rule is applicable here it could be applicable to a hundred defendants.

There would be no reason why the District Attorney, given this latitude in this case, could not thereafter charge ten defendants with ten separate conspiracies, or a hundred people with separate and distinct conspiracies and mass them all before the same jury.

In *Boyd v. United States,* 116 U.S. 616, the Court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

And, in *Krulewitch v. United States,* 93 L. Ed. 623 at 631, that Court said:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence

> of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

Here the charge related to a single conspiracy—not separate conspiracies, separately stated against separate persons, as in the case at bar.

And, in *Kotteakos v. United States,* 328 U.S. 715, 90 L. Ed. 1557, the Court said at page 1571, of 90 L. Ed.:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise are so great that no one really can say prejudice to substantial rights has not taken place."

In the present case, the State of California has permitted joinder, and construed and applied Section 954 and 1098 of the Penal Code to permit mass trial, and to permit joinder of separate defendants separately charged. It is for this Court, we respectfully submit, to determine in a hearing whether such procedure and whether such statutes, as construed and applied in this case, violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court has said in *Re Oliver,* 333 U.S. 278:

> "It is 'the law of the land' that no man's life, liberty or property be forfeited, as a punishment until there has been a charge *fairly* made and *fairly* tried in a public tribunal. See Chambers v. Florida, 309 U.S. 227, 236, 237, 84 L. Ed. 716, 721, 722, 60 S. Ct. 472. The petitioner was convicted without that kind of trial."

We submit that in the present case the petitioner was convicted without that kind of a trial, where he sat on an uneasy seat while seventy-five percent, or more, of damaging evidence was being submitted to a jury against other defendants. The great weight of that mass of testimony could not help but be prejudicial.

Due process of law does not envision a trial such as occurred in the case at bar. As Judge Van Devanter stated in the case of *United States v. Dietrich, et al.,* 126 F. 664, 671, after an exhaustive discussion of the joinder of parties, defendant and charger, both under common law and modern practice:

> "The general rule that two or more defendants cannot be severally charged in the same indictment with distinct and several offenses is well recognized * * *"
>
> "It is grounded in the right, always accorded a person accused of crime to a fair and impartial trial and to be convicted under proof of his own acts, unaffected by the atmosphere of guilt that may surround another defendant tried before the same jury for a different offense."

The defendant in California is entitled to jury trial on the issues of fact submitted to it. (California Constitution, Article I, Section 7.) A jury trial has been envisioned as a jury as constituted at common law. He is entitled to ten challenges. Where there are separate co-defendants joined in the same indictment, he must exercise some of his challenges jointly, and he has some left for individual challenge.

Such a trial as here occurred has never been allowed in the Courts of the United States.

In *McElroy v. United States,* 164 U.S. 76, 41 L. Ed. 355, the Supreme Court said:

> "The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. **In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offense or restrict the evidence to one transaction.** Young v. King, 3 T.R. 98, 106; Reg v. Heywood, Leigh & C. C. C., 451; Tindal C. J.

O'Connell v. Reg, 11 Clark & F. 241; Reg v. Ward, 10 Cox C. C. 42; Reg v. Lonsdale, 4 Fost. & F. 56; Goodhue v. People, 94 Ill. 37; State v. Nelson, 8 N.H. 165; People v. Aikin, 66 Mich. 470; Williams v. State, 77 Ala. 53; State v. Hutchings, 24 S.C. 142; State v. McNeill, 93 N.C. 552; State v. Daubert, 42 Mo. 242; 1 Bishop, Crim. Proc. § 259. Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is reversible on error."

Such a procedure as occurred herein has, except in the instant case, been universally criticized by the various state Courts including the First District Court of Appeal of California. That Court stated:

> "We have been cited to no case holding that the error in consolidating such indictments is not prejudicial."
>
> *Peo. v. Davis,* 42 Cal. App. (2d) 70, 108 P. (2d) 85.

See also

> *State v. Harkness,* 196 Washington 234, 82 P. (2d) 541.

While this Court has held that in Federal trials in Federal Courts such a procedure and proceeding would not be constitutionally allowed (see also *Pointer v. United States,* 151 U.S. 396), it has never passed upon the issue whether such mass trial is due process of law in any state of the United States of America.

We submit that such procedure must now be condemned at its inception, lest it encroach upon the con-

stitutional liberties of the citizens to be tried fairly in accordance with due process of law.

II.

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE TRIAL IN THIS CASE CONSTITUTED FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

While a state may adopt any procedure it wishes, it is governed by the provisions of the Fourteenth Amendment that, whatever its procedure is, it must result in *fair trial.* Otherwise, it offends due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Louisiana Ex Rel. Francis v. Resweber, 329 U.S. 459, 91 L. Ed. 422;

Lisenba v. California, 314 U.S. 219, 86 L. Ed. 166;

Snyder v. Massachusetts, 291 U.S. 105, 78 L. Ed. 677;

Holden v. Hardy, 169 U.S. 366, 389;

Twining v. New Jersey, 211 U.S. 78, 53 L. Ed. 97;

Adamson v. People of the State of California, 332 U.S. 46, 91 L. Ed. 1903;

Chambers v. Florida, 309 U.S. 227, 242, 84 L. Ed. 716, 724;

Malinsky v. New York, 324 U. S. 401;

Buchalter v. New York, 319 U.S. 427, 429;

Carter v. Illinois, 329 U.S. 172.

As stated in *Carter v. Illinois,* 329 U.S. 172 at 175:

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791, 98 A.L.R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."

We recognize that a State may adopt its own form of criminal procedure. However, this is restricted by:

> "The constitution commands the State to assure fair judgment."

The state must:

> "observe those ultimate dignities of man which the United States Constitution assures. Brown v. New Jersey, 175 U.S. 172, 175, 44 L. Ed. 119; Missouri v. Lewis (Bowman v. Lewis), 101 U.S. 22, 31, 25 L. Ed. 989, 992."

However wide discretion is left to the state, it cannot use a procedure such as mass trials, which would be offensive to the very concept of justice which inheres in our institutions.

The intrinsic fairness of such a criminal process is involved in this case.

Even though an accused has counsel ever so skilled in the trial of a criminal case, such counsel cannot overcome the effect of mass trials of separate crimes, separately stated, all brought before the same jury.

Such proceeding cut the ground from under a clear defense in this case. Mere association or acquaintanceship, merely sitting in the courtroom with other co-defendants throughout a long trial, illegally insufficient, is a trifle light as air that so far as the jury is concerned becomes a magnitude of evidence solemn as the Holy Writ.

Can this be fair trial in the United States of America? The Attorney General of the State of California realizes that the question is fundamental. This Court is in this case called upon to decide it. The scope and magnitude is as fundamental as that in the Due Process question raised in *Adamson v. People of the State of California* (332 U.S. 46), in *Lisenba v. People of the State of California,* 314 U.S. 219, and *Chambers v. Florida,* 309 U.S. 227, and the other cases cited supra.

In *People v. Brower,* 207 Pac. (2d) 571, Mr. Justice Peters, quoting from *Bollenbach v. United States,* 326 U.S. 607, at page 614, says as follows:

> "The federal statute on the subject is substantially similar to Art. VI, § 4½. The leading case interpreting the federal statutes in Bollenbach v. United States, 326 U.S. 607, at page 614, 66 S. Ct. 402, 406, 90 L. Ed. 350, appears the following:
>
> 'In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise

from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts. * * *

'The "technical errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. * * * From presuming too often all errors to be "prejudicial", the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.' (Emphasis added.) See, also, Bihn v. United States, 328 U.S. 633, 66 S. Ct. 1172, 90 L. Ed. 1485; Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.

The rules announced in these cases have been violated by the majority opinion. Such a violation of defendant's constitutional rights cannot be justified on the ground that a majority of this court honestly believe that defendant is guilty. The point is that defendant has not been found guilty in the manner required by law. This defendant, under our law, is presumed innocent until found guilty by a jury after a fair trial. The right to a fair trial is as important as the right to a jury trial. It is not sufficient to substi-

tute for the constitutionally protected right to a fair trial the honest belief of a majority of an appellate court that the jury could, and probably would have convicted without the inadmissible evidence."

In *People v. Davis*, 42 Cal. App. (2d) 70 at 75, it is stated:

> "* * * every case that we have found involving a situation similar to that here presented has resulted in a reversal on the ground that error was prejudicial. (Brimie v. United States, 200 Fed. 726 [119 C.C.A. 170]; Coco v. United States, 289 Fed. 33; Callahan v. United States, 299 Fed. 72; Zedd v. United States, 11 Fed. (2d) 96; Castellins v. United States, 64 Fed. (2d) 636; Cutjak v. United States, 53 Fed. (2d) 554.) There is a good discussion of the various types of factual situations that may be presented in United States v. Ashe, 2 Fed. (2d) 735, 738."

In *Cole v. Arkansas*, 333 U.S. 196, 92 L. Ed. 644, at page 648, this Court said:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jong v. Oregon, 299 U.S. 353, 362, 81 L. Ed. 278, 282."

We respectfully assert that the petitioner, Mr. Ben Sugarman, was actually sent to prison on a trial upon charges of which he was not the accused and in which there was no evidence against him personally. That seventy-five percent of the evidence, or more, was against other defendants.

The result of such a proceeding was to deny the defendant a fair trial and a trial by jury under the constitutional sense, since it was impossible to segregate the evidence which the jury felt was unfavorable to Mr. Sugarman on charges not made against him from that against co-defendants against whom charges were made in the same indictment.

To permit such mass trials is "to hold that the petitioner had been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law."

Cole v. Arkansas, 333 U.S. 202, 92 L. Ed. 648.

III.

THE COURT SHOULD GRANT THE WRIT TO DETERMINE IF PETITIONER HAS BEEN DENIED THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As this is the first case in which a citizen of the United States and of California has been singled out for invidious treatment to be tried on separate charges before the same jury en masse, the question is also presented whether such singling out and such invidious treatment constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This was presented to all of the California Courts by habeas corpus which is being brought up to this Court in conjunction with this case also, and said writ of habeas corpus was denied—Justices Jesse W. Carter and B. Rey Schauer of the Supreme Court of

the State of California voting for a hearing thereon. No opinion was rendered in the habeas corpus proceedings but the Attorney General of the State of California, the highest non-judicial officer of the state, stated that the questions were of fundamental importance and should be decided.

Louisiana v. Resweber, 329 U.S. 459;
Hysler v. Florida, 315 U.S. 411, 423;
Yick Wo v. Hopkins, 118 U.S. 356, 30 L. Ed. 220;
American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92, 45 L. Ed. 102;
Kotch v. River Port Pilot Commissioners, 330 U.S. 552, 557;
Alston v. School Board, 112 Fed. (2d) 992, 130 A.L.R. 1506;
Burke v. New York, 156 Fed. (2d) 791;
60 *Harvard Law Review* 271.

Wherefore, petitioner Ben Sugarman prays for a writ of certiorari to the District Court of Appeal, Third Appellate District, State of California, and for reversal of the judgment of the Court below denying him procedural due process of law guaranteed by the Fourteenth Amendment to the U. S. Constitution

and a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated, Los Angeles, California,
September 21, 1949.

MORRIS LAVINE,
Attorney for Petitioner.

MAX WILLENS,
OF WILLENS AND BOSCOE,
Of Counsel.

MOTION

Comes now Ben Sugarman, the petitioner herein, and moves this Honorable Court to dispense with the printing of the record on appeal in this case. Both the Attorney General and the appellant have typewritten copies of the reporter's transcript, which covers the entire trial and which has been submitted to show the unfairness of the trial in this case. The record involves several typewritten transcripts, a certified copy of which has been filed with the clerk of this Court.

The appellant is now confined in the State Prison at San Quentin and asks leave of Court to dispense with the printing of the record and the enormous cost attached to the same.

Dated, Los Angeles, California,
September 21, 1949.

MORRIS LAVINE,
Attorney for Petitioner.

MAX WILLENS,
OF WILLENS AND BOSCOE,
Of Counsel.

NOV 9
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 354

BEN SUGARMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

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In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1949

No. ----

BEN SUGARMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to the District Court of Appeal of the State of California, in and for the Third Appellate District, to review the decision of said court affirming the judgment of the Superior Court of the State of California, in and for the County of San Joaquin, which found petitioner

guilty of the crimes of conspiracy to commit grand theft, grand theft, and the violation of Section 556 of the Insurance Code of the State of California.

Pursuant to the convictions under certain counts of the indictment, sentences were imposed upon petitioner by the trial court, to run concurrently in the California State Penitentiary at San Quentin.

The judgment of the District Court of Appeal sought to be reviewed was entered May 6, 1949, and is reported in 91 Advance California Appellate Reports 817, 205 P. (2) 1065. A petition for rehearing was filed by said petitioner within the time allowed by law and was denied by said court. A petition for hearing in the California Supreme Court was filed by petitioner and denied by said court on June 2, 1949. The remittitur issued from the District Court of Appeal in said matter on June 6, 1949.

Thereafter, petitioner again sought to attack said judgment by filing a petition for writ of habeas corpus in the Superior Court of the State of California, in and for the County of San Joaquin. This was denied on June 9, 1949. On June 10, 1949, he filed a petition for writ of habeas corpus with the District Court of Appeal of the State of California, in and for the Third Appellate District. This was denied by said court without opinion on June 15, 1949. Thereafter, petitioner filed a petition for writ of habeas corpus with the Supreme Court of the State of California, which was denied by said court without opinion on July 14, 1949.

It should be noted that the arguments raised by the petitioner Sugarman in his petitions for writs of habeas corpus in the California courts raised no points not considered by the state courts on the appeal in said matter on its merits.

In view of the inaccuracies contained in petitioner's statement of the case, his failure to adopt the facts as set forth in the appellate court's opinion and his incorporation of argumentative material * in the statement, we deem it necessary to set forth an additional statement pursuant to Section 4 of Rule 27 of this court.

On April 3, 1947, defendants Burton, Martin, and petitioner Sugarman were indicted by the grand jury of San Joaquin County on nine counts: Conspiracy to commit grand theft, grand theft, and violation of Section 556 of the Insurance Code. Counts 1 and 2—conspiracy to commit grand theft and grand theft—pertained to all the defendants. Counts 3 to 8 inclusive, pertaining to conspiracy to commit grand theft and grand theft, charged Burton and Martin. Count 9—a violation of Section 556 of the Insurance Code—pertained to defendant Sugarman alone (CT 1-7).† The facts may be summarized as follows:

On February 2, 1949, Don Burton and Mary Burton were the owners of an office building known as the Don Burton Building in the City of Stockton at which

* For example, the assertion (Petition, page 8) that "more than 75 percent of the evidence in the record pertained to the defendants Burton and Martin alone" is not borne out by the testimony of some 90 witnesses who inculpated petitioner.

† CT refers to Clerk's Transcript.

location Burton owned and operated a shoe store on the ground floor of the building (RT III: 989; IX 2831).* He carried two policies of fire insurance with the Phoenix Assurance Company, one covering the fire insurance on the building and a second policy covering the stock or merchandise located in the shoe store (RT II: 430). He carried a policy of fire insurance with the St. Paul Fire and Marine Insurance Company covering furniture, fixtures, and equipment in the building (RT II: 551), and a business interruption policy with the Connecticut Fire Insurance Company (RT II: 582-3).

On Saturday, February 2, 1946, at about 3.45 p.m. the Stockton Fire Department responded to an alarm from the Burton Building, located in the same block as the fire station (RT II: 691; III: 977). An oil fire covering an area of approximately three by two feet and about three feet in height, was found burning on the cement floor in front of the main boiler in the basement of the building (RT III: 983-6). Not more than three to five minutes elapsed from the time the fire department received the call to the time the blaze was extinguished (RT III: 987). This was accomplished by making two passes over the blaze with what is known as a booster line equipped with a dual-purpose nozzle opened to the fog position, an operation that consumed approximately one quart of water (RT III: 985; IV: 1125). The smoke, entirely confined to the furnace room, was insufficient to dis-

* RT refers to Reporter's Transcript.

comfort the firemen or to discolor their clothing or faces, and the firemen found no need of ventilating the shoe store after the fire was out in the basement (RT III: 988; IV: 1127-8). The chief of the Stockton Fire Department testified there was no damage whatever as a result of the fire (RT II: 700). In the first place, none of the employees or customers complained of any discomfort, and the elevators continued to operate during the brief period of the fire. Merchandise located both in the storeroom and in the shoe store proper sustained no damage by soot or otherwise, nor did it become necessary for customers to return or exchange such merchandise; furthermore, no price reductions were made because of the fire (RT IV: 1297, 1302; VI: 1681, 1684, 1687, 1803; VII: 2016-7; V: 1538). Carpeting and other furnishings in the store were undamaged, and even work clothes left hanging in the basement—the site of the fire—by the employees of the building were not harmed in any way (RT V: 1544, 1566, 1595-8; VII: 1902, 1917; IX: 2640-2). Finally, an electric motor which protruded in front of the furnace and was located some 20 inches above the ground directly over the fire, was not damaged (RT XVII: 5136-7).

The morning following the fire petitioner's co-defendant, Frank Martin, was contacted by Burton's Sacramento insurance agent. He asked Martin to accompany Burton to Stockton with reference to the fire loss (RT XIV: 4412-3; 4416-9). Martin advised Burton at that time that he, Martin, had not been

formally employed by the insurance company, but that he would proceed to San Francisco the following day in an attempt to secure authority to handle the loss (RT XIV: 4428; XV: 4443). Thereafter, Martin drove to San Francisco with advance adjuster's reports and delivered two of them to Mr. English, Manager of the Phoenix Assurance Company, informing English that there had been a very great loss and requesting the aid of a salvage man (RT XV: 4444-6; II: 440-1). He asked English if the company would object to the employment of Sugarman, with whom Martin had been acquainted for eight years and by whom he was then employed for the purpose of appraising properties in Portland, Oregon (RT II: 443; XV: 4639-42; XVI: 5032). English, it seems, had known Sugarman for 30 years and authorized the latter's employment (RT II: 443). Martin then advised English that Burton's Sacramento agent desired Martin to handle the adjustment, and English also agreed to this suggestion (RT XV: 4446-51). Subsequently, Martin successfully solicited the job of adjusting the loss for the St. Paul Company and the Connecticut Fire Insurance Company on the basis that he was acting in that capacity for Phoenix (RT XV: 4450-2).

Martin later went to the office of Sugarman Brothers and told them that English had chosen petitioner to handle the salvage (RT XV: 4454; XVI: 5001). Following this meeting petitioner drove alone to Stockton, where he was met by Martin and intro-

duced to the manager of the store. He proceeded to inspect the merchandise in the store and in the stockrooms (RT XVI: 5002-4). This inspection, Sugarman testified, resulted in a determination that the merchandise had been damaged; however, he was unable to ascertain the salvage thereof since the inventories were in Sacramento, where he arranged to meet Martin the next day (RT XVI: 5004).

At that meeting Martin introduced petitioner to Burton who was accompanied by one Saunders, an employee (since deceased). The testimony is contradictory as to the conversation that followed. Martin stated that Burton objected to his stock being taken over for salvage (RT XV: 4461); Sugarman testified that he was left alone with Saunders while Martin and Burton held a private conversation (RT XVI: 5007). Sugarman finally requested that inventory figures in addition to those shown him, be placed at his disposal and asked Martin to notify him when the same were ready (XVI: 5006-7).

The following month Burton furnished these figures, some of them being reflected on adding machine tapes given to Martin and shown in turn by him to Sugarman. Notwithstanding his employment for that purpose, no report was ever forthcoming from Sugarman as to whether or not the Phoenix Company should take over the Burton stock for salvage; instead, he prepared a "merchandise loss" (People's Exhibit No. 3), using the figures and computation on the adding

machine tapes he had received from Martin (RT XV: 4658). The figures set forth in this exhibit were thereafter incorporated in their entirety in Martin's final proof of loss transmitted to the Phoenix Company, upon which payment was made to Burton, its insured. Martin informed Sugarman, it also appears, that he was going to use the percentage arrangement which Sugarman had theretofore worked out as the basis of settlement with Burton. Sugarman admitted knowledge of this fact (RT XVI: 5032).

In February, 1946, one Harry Ex—likewise an adjuster—also made his appearance on the scene. The record shows that he and Sugarman had enjoyed a business acquaintance for over 20 years (RT VI: 5038; X: 2951; IX: 2747). It was the contention of the defense that Burton, acting upon the suggestion of his employee Saunders, had hired Ex to represent his interests (RT XVI: 4867-8); nevertheless, the income tax adviser for Burton, as well as his head bookkeeper, were kept in ignorance of Ex's status, and to Miss Brudigan (the head bookkeeper for Burton) Martin stated that the large fee eventually paid by her employer to Ex was none of his (Martin's) concern, adding that it was a private matter between Burton and Ex.

The activities of Ex following his alleged employment by Burton were described in considerable detail by the defendants, although they never called him as a witness to corroborate their respective claims. Thus, there was testimony that Ex, upon his arrival in Sac-

ramento, advised Burton not to let Sugarman know of his employment, and later submitted a contract for his services, which Burton signed (RT XVI: 4868). According to the defendants, the manager of the Stockton store then prepared a detailed inventory for Ex, and he and Burton thereafter had three or four telephone conversations in which Ex advised Burton how to handle his claim (XVI: 4869). Later, Ex called at Burton's Sacramento office and desired to know the basis on which the Phoenix claim had been settled. When Burton informed him the settlement was for more than $15,000, Ex insisted that he immediately be compensated on a basis of 10 percent of the whole inventory if he succeeded in saving the stock. To pacify Ex, according to the defense, Burton gave him a check that day for $8,500 (RT XVI: 4871). In that connection, it is interesting to note that Burton's subsequent settlement with Martin was made without Ex's knowledge or approval, notwithstanding the claim of the defendants that Ex had been hired to protect Burton's interest.

The day following Ex's receipt of the $8,500 check a person of then unknown identity appeared at the San Francisco Main Branch of the Bank of America and presented the instrument for payment (RT IX: 2774, 2776). One M. J. Simpson, a Vice President of the San Francisco bank, filled out an application for exchange, requesting and later receiving a cashier's check in the sum of $3,312.50 (People's Exhibit 39).

The following notation appears on that exhibit: "M. J. Simpson for Harry Ex" (RT IX: 2777). The balance of Burton's check, amounting to $5,187.50, was transferred over to the bank's commercial department and taken in cash. Two names appeared at the bottom of the debit slip which went through the commercial department and indicated that it was paid in cash: "A. Semenza," the receiving teller and an assistant cashier in charge of the Exchange Department, and "M. J. Simpson."

From February 28, 1946, to September 23, 1946, petitioner Sugarman and M. J. Simpson were joint tenants of safe deposit box No. 9016 in Simpson's bank (RT IX: 2785). From September 23, 1946, to May 24, 1947, safe deposit box No. 409 in Simpson's bank stood in the name of petitioner Sugarman and his brother Harry, with power of attorney or agency held by M. J. Simpson (RT IX: 2783). On May 24, 1947, the date Simpson was subpenaed by the San Joaquin County Grand Jury, the tenancy of the last-numbered box was placed exclusively in the name of petitioner Sugarman (RT IX: 2783, 2802).

On March 5, 1946, three days after the cashier's check for $3,312.50 was secured from Simpson's bank, Ex negotiated a cashier's check in that amount through the Union Bank and Trust Company, Los Angeles, which was later paid by Simpson's bank on March 6, 1946 (RT IX: 2787).

On June 22, 1946, sums aggregating $770 were deposited to the account of Frank O. Martin, general

adjuster, in the Tule Lake Branch of the Bank of America. Of this amount, $520 was represented by a check drawn against the account of Sugarman Brothers in Simpson's bank at San Francisco (RT IX: 2789-90). At the trial, the defense sought to establish that this last check represented payment of services rendered by Martin on petitioner's behalf in Portland, Oregon.

Burton, meantime, had contacted one Wolters with the view of painting the Stockton building under the coverage reflected in the second Phoenix policy (RT VII: 2236). Wolters gave Martin an estimate and was told to proceed. He then repainted a basement, shoe store, halls, stairway, storage rooms, corridors, and some thirty-six offices in the building (RT VII: 2238, 2224-5, 2255). The statement of Wolters in the sum of $9,610, together with a blank billhead, were subsequently mailed to Burton at Sacramento. Martin, or his stenographer at Martin's direction, filled in the blank billhead, raising the amount to $14,952.51 (RT VIII: 2502, 2504-5). This latter fact was stipulated to by the defense upon the trial. Burton then paid Wolters a total of $9,610 although he had received $14,952.51 from the Phoenix Company (RT VII: 2265). At the trial it was brought out that Martin went to Stockton on October 1, 1946, and handed Wolters a check in the sum of $1,957, which he requested Wolters to cash and return the proceeds to him (RT VII: 2265). Martin also asked Wolters to show this check on his books, advising him that he would take

care of any increase in the latter's income tax (RT VII: 2267). In 1947, after the defendants were indicted, Martin accompanied Sugarman and Sugarman's son on a visit to Wolters, at which time Wolters was told to keep quiet and not to talk to anyone (RT VII: 2273).

Martin's original report to the St. Paul Company estimated a 20 percent loss under the policy (RT IX: 2865-6); this estimate was later raised to 55 percent, and again to 85 percent, and finally Martin filed his closing report, on the strength of which the St. Paul Company issued a draft to Burton for $6,716.57 (RT IX: 2882). The further sum of $132.50 was paid to Martin in accordance with his statement (RT IX: 2877).

On the Connecticut Company policy, Martin prepared an adjuster's report which estimated a loss of 10 percent on the use and occupancy policy carried with that company (RT X: 2886). In another letter to the company, Martin falsely stated that the store did not open at 10 a.m. on five different days, that it was closed on two days, and that on the afternoon of the fire there was a loss of business from 3.15 to 5.30 p.m. (RT X: 2891-3). Upon receipt of Martin's final report the Connecticut Company issued a draft to him for $166.96 in payment of his services and another draft for $2,029.61 to Don Burton's Shoe Salon (RT II: 584; IX 2902).

Subsequent to Martin's surrender, he turned over certain records and files of his office, which included

therein the previously referred to Exhibit No. 3 which Martin stated was the computation of the stock loss as drawn up by Sugarman in Sugarman's own handwriting (RT VIII: 2487, 2567). Martin stated that the figures so set forth were the basis of the computation of the loss submitted (RT VIII: 2499); that his schedule dated February 2, 1946, relating to shoes, carpets, furnishings, and other merchandise, showing an alleged damage of $15,550.59, was prepared from the information given him by Sugarman (RT VIII: 2567); and that he copied these figures without correction or alteration as to his statement of the cash value and loss submitted to the Phoenix Company (RT IX: 2834-5).

ARGUMENT

SUMMARY OF ARGUMENT

I. The Decision of the Court Below Did Not Violate Petitioner's Rights Under the Fourteenth Amendment to the Constitution of the United States.

A. No Question of a Mass Trial Was Involved in the Instant Proceeding.

B. Sections 954 and 1098 of the Penal Code of the State of California Are Constitutional.

II. The Petitioner Was Granted Equal Protection of the Laws.

I. The Decision of the Court Below Did Not Violate Petitioner's Rights Under the Fourteenth Amendment to the Constitution of the United States

The evidence hereinabove set forth and reflected in the decision of the District Court of Appeal clearly establishes the petitioner's activity in the offenses charged. The original transcript in this matter contained over 6,000 pages of testimony. There were cer-

tain conflicts in testimony which were resolved against the defendants and petitioner herein by the jury and affirmed on appeal.

People v. *Newland,* 15 Cal. 2d 678, 104 P. (2) 778;
People v. *Perkins,* 8 Cal. 2d 502, 66 P. (2) 631;
People v. *Tom Woo,* 181 Cal. 315, 184 P. 389.

The foregoing determination by the triers of fact was not so lacking in evidentiary support that to give it effect would work that fundamental unfairness which is at war with due process; therefore, this court is not warranted in refusing to accept such determination.

Lisenba v. *California,* 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280.

Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State and the due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

Holden v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780;
Hurtado v. *State of California,* 110 U. S. 516, 4 S. Ct. 111, 121, 27 L. Ed. 232;
Twining v. *New Jersey,* 211 U. S. 78, 112, 29 S. Ct. 14, 53 L. Ed. 97.

A. NO QUESTION OF A MASS TRIAL WAS INVOLVED IN THE INSTANT PROCEEDING

Petitioner is urging as his first specification of error that the application of Sections 954 * and 1098 * of

* Sections 954 and 1098 of the Penal Code are set forth in the Appendix hereto.

the Penal Code of the State of California to the instant matter permit a "mass trial" to the defendant's prejudice and therefore are violative of the Fourteenth Amendment to the Federal Constitution.

A brief examination of the record discloses the fallacy of the petitioner's contention. There were only three defendants involved in this matter. In the first count of the indictment all defendants were joined in a *conspiracy* charge; in the second count, the substantive offense of grand theft, all the defendants were jointly charged; in the third to eighth counts, two of the defendants were charged, and in the ninth and last count the petitioner herein was solely charged with a violation of Section 556 of the Insurance Code.

All of the offenses charged grew out of the same transaction, the claimed fire loss and the subsequent false insurance claims made by the defendants. The evidence showed that no damage resulted from the fire. Contrary to petitioner's contention, at least 75 percent of the evidence was to the extent of damage done by the fire, if any, and would have been admissible against him on a separate trial. The extent of damage done by the fire, if any, was the substantial element of importance common to all the charges of the indictment. Each of petitioner's co-defendants was found guilty of the crimes charged. The appellate courts of the State of California reviewed in detail the evidence presented and the instructions given to the jury. Any error complained of in such trial proceeding was clearly within the scope of the court's

review on appeal and was a matter of state procedure and practice.

The cases cited by petitioner in support of his contention that the petitioner was the victim of a "mass trial" are not in point nor do they support his contention.

In *Boyd* v. *U. S.,* 116 U. S. 616, the court held that the provisions of the revenue laws of the United States allowing a United States court on the motion of the United States attorney to require the defendant to produce his records under penalty of admitting the allegations of the governmental attorney's charge was violative of the Fourth and the Fifth Amendment to the Federal Constitution. *Krulewitch* v. *United States,* 93 L. Ed. 623, merely holds that extra-judicial declarations of a co-conspirator were not admissible in evidence when made after the conspiracy was over. In *Kotteakos* v. *U. S.,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, the prosecution was in a federal court for a conspiracy to violate the National Housing Act. The court held that the evidence showed more than one conspiracy and that the jury could not possibly have found only one conspiracy; therefore, the trial court erred in instructing the jury that only one conspiracy was shown and that the acts and declarations of one conspirator bound all. In the case of *In re Oliver,* 333 U. S. 257, a prisoner was jailed for contempt under the order of a one judge-grand jury. The court held that the prisoner was denied procedural due process in that he was not afforded a reasonable

opportunity to defend himself against the charge but was tried and convicted in grand jury secrecy. *Snyder* v. *Massachusetts,* 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, held that the question of admissibility of evidence was for a state court to determine. In *McElroy* v. *U. S.,* 164 U. S. 76, 41 L. Ed. 355, a different factual situation was presented. There, the consolidation for trial of four indictments was held to be unwarranted; since the offenses were not connected in their commission, the nature of the offenses was different and the indictments were against different defendants.

As is apparent, the instant matter is not comparable. Here there were only three defendants including petitioner. They were all charged and convicted of the first two counts in one indictment. Petitioner alone was charged and convicted of the last count of the indictment and the remaining defendants were convicted of all the remaining counts of said indictment. There was a substantial element of importance common to all the offenses, the fire and extent of damage resulting therefrom, if any, upon which the charges were based. The offenses were connected in their commission and they were of the same class of crimes. The great majority of the evidence was necessary to prove the offenses with which petitioner was charged and would have been admissible even on a separate trial of petitioner. In *Pointer* v. *United States,* 151 U. S. 396, the statute relating to joinder was not similar to the California statute but the court, nevertheless, upheld the joinder on the ground there was a close

connection between the two killings and it would have been difficult to separate the proofs of the offenses.

Rule 8(a) and (b) Federal Rules of Criminal Procedure are now substantially similar to the provisions of Section 954 of the Penal Code of the State of California and their application has been upheld.

Cataneo v. *U. S.,* 167 F. (2) 820.

Viewing petitioner's contention realistically, it would appear that he is raising the contention that joinder of defendants or offenses is not permissible under threat of a "mass trial," regardless of whether there are two or more defendants. His statements are not supported by the record nor do they reflect the law in the State of California or that applied by the federal courts.

People v. *Bundte,* 87 Cal. App. 2d 735, 197 P. (2) 823 (cert. den. 337 U. S. 915);
Cataneo v. *U. S.,* 167 F. (2) 820;
Soblowski v. *U. S.,* 271 F. 294 (cert. den. 41 S. Ct. 537, 256 U. S. 697, 65 L. Ed. 1176);
United States v. *Antonelli Fireworks Co.,* 155 F. (2) 631 (cert. den. 67 S. Ct. 49, 329 U. S. 742, 91 L. Ed. 640; rehearing den. 67 S. Ct. 182, 329 U. S. 826, 91 L. Ed. 701);
Caringella v. *U. S.,* 78 F. (2) 563, 567;
Ashe v. *Valotta,* 270 U. S. 424.

This latter decision in *Ashe* v. *Valotta,* 270 U. S. 424, reverses the case of *Ashe* v. *U. S.,* 2 F. (2) 735, cited and relied upon by petitioner on the question of joinder and holds that it is a matter of state procedure.

B. SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA ARE CONSTITUTIONAL

Section 954 of the Penal Code of the State of California permits the joinder in an indictment of two or more different offenses which are connected together in their commission, or two or more different offenses of the same class of crimes. To render the joining of counts in an indictment valid, the Supreme Court of the State of California in the case of *In re Pearson,* 30 Cal. (2) 871, 186 P. (2) 401, has held it to be sufficient if the offenses are of the same class or "if there is a common element of substantial importance in their commission."

The District Court of Appeal in its decision in the instant matter (91 A. C. A. 817, 836) stated:

> "It clearly appears that in each of the main circumstances the occurrence of the fire, the subsequent attempts to defraud the insurers, and the filing of false claims and appraisals is a common element of substantial importance in the offenses included in the indictment so as to permit their joinder."

In the case of *People* v. *Bundte,* 87 Cal. App. (2) 735, 197 P. (2) 823 (cert. den. 337 U. S. 915), the defendants therein urged that the application of Section 954 of the Penal Code resulted in a denial to them of due process of law. In that case the indictment contained three counts of riot—violation of Section 404 of the Penal Code, and nine counts of assault with a deadly weapon—violation of Section 245 of the Penal Code. The first two counts of riot occurred several

days previous to the third riot count and the assault charges and at different places. The district court in its decision held that the joinder was proper as all offenses charged grew out of the same series of connected transactions and that they belonged to the same class or character of offenses—also that there was a common element of substantial importance in their commission. A hearing was denied by the California Supreme Court and by this court.

See also the companion case of *People* v. *Moore,* 87 Cal. App. (2) 753, 197 P. (2) 835 (cert. den. 337 U. S. 915).

In the case of *People* v. *Jordan,* 24 Cal. App. (2) 39, 74 P. (2) 519, the indictment contained two conspiracy counts against all defendants and thirteen counts merely charging some two of the defendants with the substantive offenses. In finding the indictment valid and the motions for separate trials made by the various defendants properly denied, the court stated:

"All of the offenses were of the same general class and involved largely the same evidence, and it could well be said that it was in the interest of justice that all of the charges be tried together. The matter was one within the discretion of the court and nothing appears to show that this discretion was abused."

See also *People* v. *Flores,* 62 Cal. App. (2) 700 145 P. (2) 318 and *People* v. *Guerrero,* 22 Cal. (2) 183, 137 P. (2) 21, both of which cases uphold said section.

That Section 954 of the Penal Code has long been held constitutional and its application not in violation of constitutional provisions appears from the following cases decided by the various courts of the State of California.

People v. *Kelly,* 203 Cal. 128, 133-5; 273 P. 226;
In re Pearson, 30 Cal. (2) 871; 186 P. (2) 401;
In re Culver, 84 Cal. App. 295, 257 P. 876;
People v. *Grossman,* 28 Cal. App. (2) 193, 82 P. (2) 76;
People v. *Gryszkiewicz,* 88 Cal. App. (2) 230; 198 P. (2) 585.

The contention that this section violates either the federal or the State Constitution by making possible the deprivation of the right to trial by jury as such right existed at common law has been rejected by the California Supreme Court.

In re Pearson, 30 Cal. (2) 871; 186 P. (2) 401;
People v. *Kelly,* 203 Cal. 128, 133-5; 263 P. 226.
See, also, *Ashe* v. *Valotta,* 270 U. S. 424, 46 S. Ct. 333, 70 L. Ed. 662.

To afford due process of law an indictment or information must contain a statement of the facts which constitute the offense with reasonable certainty so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense. Due process is not denied by grouping several felony counts in one indictment or by a statute, such as Section 954, which authorizes the charging of two or more different offenses of the same class of

crimes or different offenses growing out of the same transaction in one indictment or information.

16 Corpus Juris Secundum, Sec. 587, p. 1180;
42 Corpus Juris Secundum, Sec. 180, p. 1140.

Section 1098 of the Penal Code deals with the trial of defendants who have been charged jointly, the requirement being that they be tried jointly unless the court shall order separate trials. This section is declaratory of the common law. (*People* v. *Perry,* 195 Cal. 623, 234 P. 890). In the case of *People* v. *Dowell,* 204 Cal. 109, 266 P. 807 (cert. dis. 278 U. S. 680, 49 S. Ct. 7, 73 L. Ed. 568), the validity of this statute was in issue and the court stated, "there is no federal question, constitutional or otherwise, involved." In the case of *People* v. *Yeager,* 194 Cal. 452, 229 P. 40, the California Supreme Court stated with relation to this section:

> "It is within the province of the legislature to vest the trial court with authority to decide whether there shall be a separate or a joint trial of defendants jointly charged."

To the same effect, see, *People* v. *England,* 140 Cal. App. 310, 315, 35 P. (2) 565.

The law of the State of California vests the trial court with discretion in granting a separate trial and this discretion will not be interfered with by an appellate court in the absence of a showing of abuse of discretion. (*People* v. *Baa,* 24 Cal. (2) 374, 150 P. (2) 1; *People* v. *King,* 30 Cal. App. (2) 185, 85 P. (2) 928; *People* v. *Eudy,* 12 Cal. (2) 41, 45, 82 P. (2) 359).

The state courts reviewed this action of the trial court and found that it acted within its discretion in denying petitioner a separate trial. Clearly this was a question within the confines of state procedure and discloses no federal question for the federal courts follow the same rule.

Soblowski v. *U. S.*, 271 F. 294 (cert. den. 256 U. S. 697).

Where, as in this matter, nearly all of the evidence related to the fire and the extent of the damage, if any, caused thereby and would have been admissible in a separate trial of petitioner, it is apparent as found by the state courts, that the trial court did not abuse the discretion residing in it when it denied petitioner's motion for a severance. Sections 954 and 1098 of the Penal Code of the State of California in their application to the petitioner herein did not in any wise constitute a denial to him of due process of law guaranteed him by the Fourteenth Amendment to the Federal Constitution, nor has he demonstrated that their application prejudiced his constitutional rights in any manner.

II. The Petitioner Was Granted Equal Protection of the Laws

As was stated by this court in the case of *Lisenba* v. *California*, 314 U. S. 219, 227-8, 86 L. Ed. 166, 62 S. Ct. 280, 286:

"* * * The Fourteenth Amendment leaves California free to adopt a rule of relevance which the

court below holds was applied here in accordance with the State's law."

The procedure adopted by the State of California with relation to the joinder of offenses in an indictment and information and with relation to joint trials is a matter of state procedure. A review of the record discloses that the petitioner herein was accorded a fair and complete trial. Notwithstanding petitioner's allegations of "mass trial," there is nothing in the record to support such contention where but three defendants were charged and jointly tried for offenses arising out of one transaction. There is no question but that petitioner herein was adequately represented at all stages of the proceeding. Petitioner has presented no facts substantiated by the record to show that he "was singled out for invidious treatment," and thus denied due process of the law.

The cases cited by petitioner in support of this contention are not in point. In *Francis* v. *Resweber,* 329 U. S. 459, a defendant convicted of murder and sentenced to be executed was returned to prison after his execution failed due to mechanical difficulties. He urged that a second attempt at execution would result in a cruel and unusual punishment and double jeopardy. This contention was rejected by the court. The court made the following statement, however, which is directly applicable to this matter, "So long as the law applies to all alike, the requirements of equal protection are met." *Kotch* v. *Pilot Comm'rs.,* 330 U. S. 552, involved the constitutionality of the pilotage law of

Louisiana which was found to be constitutional even though it affected the activities of some groups differently from the manner in which it affected the activities of other groups. *Alston* v. *School Board,* 112 F. (2) 992, related to an injunction proceeding brought against state school authorities by a Negro school teacher where discriminatory pay rates based on race were found to deny petitioner equal protection of the laws. *Burt* v. *City of New York,* 156 F. (2) 791, held that the members of an administrative board were civilly liable in an action brought in a federal court if they injured plaintiff by purposeful discriminatory action under pretended justification of statute. In *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220, the fact that the defendant was denied the right to engage in certain occupations solely because of the fact he was Chinese was held to result in denial of equal protection of the laws. In *Hysler* v. *Florida,* 315 U. S. 411, this court upheld the Florida procedure requiring leave of court first being granted before a petition for writ of error coram nobis could be filed as not resulting in a lack of due process. In *American Sugar Refinery Co.* v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102, a state statute imposing a license tax on the refining of sugar and molasses but exempting therefrom planters and farmers growing their own sugar was held constitutional and as not denying sugar refiners equal protection of the laws under the Fourteenth Amendment.

Thus it would appear that none of the cases cited by petitioner in any way constitute authority for his position in the instant matter.

The history of the joinder statutes in California and also in the federal courts shows the tendency to liberalize such procedure in order to expedite the course of justice and relieve the state and federal governments of the burden of a multiplicity of different trials involving the same evidence. As hitherto set forth petitioner has not been singled out for invidious treatment but the law applies to all alike in California and has been so administered.

People v. *Jordan,* 24 C. A. (2) 39, 74 P. (2) 519;
People v. *Flores,* 62 C. A. (2) 700, 145 P. (2) 318;
People v. *Guerrero,* 22 Cal. (2) 183, 137 P. (2) 21;
People v. *Kelly,* 203 Cal. 128, 263 P. 226;
People v. *Dowell,* 204 Cal. 109, 266 P. 807 (cert. dis. 278 U. S. 660);
People v. *Bundte,* 87 Cal. App. (2) 735, 197 P. (2) 823.

In this respect respondent would note that the quotation from the case of *People* v. *Brower,* 92 A. C. A. 668, 207 P. (2) 571, is from the dissenting opinion and not from the majority opinion of the court.

CONCLUSION

Respondent submits that upon the record and for the reasons stated it is sincerely believed that petitioner has not stated a federal question of substantial importance warranting this court in issuing the writ

prayed for. The petitioner received a very fair and impartial trial, the jury was fairly and fully instructed on all material issues, and there was no miscarriage of justice. The matter was decided pursuant to well-established principles of California law and Sections 954 and 1098 of the Penal Code of the State of California in their application to the instant matter do not deny petitioner any of his rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

It is, therefore, respectfully submitted that the petition for writ of certiorari in the instant matter should be denied.

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San Joaquin County

Dated, Sacramento
November 4, 1949

In the Supreme Court
OF THE
UNITED STATES

OCTOBER TERM, 1949
No. ----------

BEN SUGARMAN,
Petitioner,
v.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

Comes now, the respondent The People of the State of California and objects to the request of petitioner to dispense with the printing of the record on the Petition for Certiorari and on the hearing thereof in that petitioner herein has presented no grounds to the court to except himself from the provisions of Rule 38 of the Rules of the Supreme Court and that he should not be entitled to the granting of such motion without a showing that petitioner is insolvent and unable to bear the burden placed upon litigants in this court

who also are and have been in prison pending the application for a writ of certiorari to this court.

Dated: Sacramento, California
November 4, 1949

FRED N. HOWSER
Attorney General of the
State of California
Attorney for Respondent

Of Counsel:

DORIS H. MAIER
Deputy Attorney General

CHESTER E. WATSON
District Attorney
County of San Joaquin

APPENDIX

California Penal Code, Section 954

An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes of offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

California Penal Code, Section 1098

When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at

different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

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